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THE OLD ROMAN LAW AND A MODERN AMERICAN CODE *

II.

In Book II, on Property, Ownership, and its Modifications, the Porto Rican Code follows closely its Spanish prototype. The main variation in general outline is the omission from the American code of the special property in minerals and in intellectual productions.

There is a chapter on "General Principles" introduced into the first title of the Porto Rican Code which seems particularly open to the criticism of definitions as such, expressed in Merrick's Civil Code of Louisiana.⁵⁸ The addition to the definition of the word "Property" that, "it is likewise relative to the word 'Things,' which is the second object of jurisprudence, the rules of which refer to persons, things and actions,"⁵⁹ does not seem especially helpful. That the classification of "things" into "common" and "public," and "corporeal" and "incorporeal" things, though resting on good old classical precedents,⁶⁰ is not very illuminating to the modern legalists, seems evident from the fact that they were passed over in silence by the codifiers of the Code Napoléon and of the Spanish Civil Code, though revived in the Louisiana Code and transferred thence to the Porto Rican Code. The use made of the term "incorporeal things" in Sections 336 and 343 is gratuitous, as these sections are borrowed from the Louisiana Code,⁶¹ and the Louisiana Code in the first instance describes the thing, without using the term, and, in the second, the term may be omitted without impairing the clearness of the passage. The simple definition of things movable in the Spanish Code, by exclusion of things described under immovables, with the addition of "incomes, pensions, alienated offices, contracts for public services, and mortgage loan bonds or certificates,"⁶² as belonging in the category of movable things, is considerably elaborated in the Porto Rican Code by additions and classifications taken from the Louisiana Code.

The *bienes inmuebles* and *bienes muebles* of the Código Civil Español throughout this title have been translated by "real property" and "personal property," both by the official translation of the

*Continued from 3 MICHIGAN LAW REVIEW, p. 119.

⁵⁸ "Definitions are, at best, unsafe guides in the administration of justice; and their frequent recurrence in the Louisiana Code is the greatest defect in that body of laws." Prefatory note to Preliminary Title, p. 1; cf. Just. Dig. 50, 17, 202.

⁵⁹ P. R. Code, Sec. 324, copied from Civ. Code of La., Art. 448.

⁶⁰ Just. Inst. 2, 1, pr.; Dig. 1, 8, 2; Gaius, Inst. 2, 12.

⁶¹ Cf. Art. 471 and 475.

⁶² Sp. Code, Art. 335, 336.

Bureau of Insular Affairs and by Dr. Walton. Their translation by the terms "immovable" and "movable," in the Porto Rican Code, may be less confusing to the American lawyer who might attempt to find the place of "chattels real" under personal property.

The title on community of ownership of property, with its elaborate provisions for joint ownership of a building of which the different stories belong to different owners, is transferred almost verbatim from the Spanish to the Porto Rican Code.⁶³

In the last section (432) of the title on "Waters," in the Porto Rican Code, we have the statement that "Anything not expressly determined by the provisions of this chapter shall be governed by the Special Law of Waters." Until such "Special Law of Waters" is issued by the Porto Rican Committee on Revision, we are left to the supposition that this refers to the Spanish Law of Waters, translated by the Division of Insular Affairs, War Department of the United States, in 1900.

That *bête noire* of the German civilians, "juristic possession,"⁶⁴ seems to be admitted into the Spanish Civil Code in the definition of natural and civil possession. "Natural possession is the holding of a thing or the enjoyment of a right by a person. Civil possession is the same holding or enjoyment, together with the intention of acquiring ownership of the thing or right."⁶⁵ The definition of "civil possession" here given seems to have the *corpus plus animus* of Savigny's juristic possession,⁶⁶ and one might expect that the fine spun distinctions between the natural possessor and the juristic possessor of the old Roman law, that have given so much trouble to modern civilians, were again to be enunciated in this code. Such does not seem to be the case, however, so far as the effects of natural and civil possession are concerned, and the Code of Civil Procedure specifically says that, "summary proceedings to retain or recover possession shall lie when the person who is in possession or *in tenancy* of a thing has been disturbed."⁶⁷ It is a cause of congratulation to Porto Rican lawyers, and to American lawyers who may deal with Porto Rican legal questions, that this question was left on the other side of the Atlantic. The New Code of Procedure for Porto Rico, 1904, does not even mention the subject.

It seems rather unfortunate that the Spanish codifiers did not

⁶³ P. R. Code, Sec. 399-413; cf. Sp. Code, Art. 392-406.

⁶⁴ Cf. the discussion of this subject by Monroe Smith, in his paper on von Ihering, in the Pol. Sci. Quart., vol. 11 (1896), p. 278 ff.

⁶⁵ Sp. Code, Art. 430—P. R. Code, Sec. 433.

⁶⁶ Cf. Sohm, Institutes, Sec. 67, Note 2.

⁶⁷ Code of Civil Procedure, Trans. by Division of Insular Affairs, Art. 1649. In a note to this section, a decision of June 25, 1880, is quoted, in accordance with which lessees may defend themselves in their own right.

adopt the simple classification of *iura in re aliena* used by the modern German civilians,⁶⁸ and divide them into personal and real servitudes, with reference to the subject rather than the object of the servitude, including under the first, those whose subject (owner) was a definite person, the easement in gross of the English law, and under the second, those whose subject (owner) was to be determined by reference to a thing; namely, the dominant estate, the easement appurtenant to land of English law. In the sixth title of the Spanish Code we have a discussion of the personal servitudes of usufruct, use and occupancy, without any statement as to their essential character and relations to servitudes in general. In the next title the real servitude is defined (Art. 530) but its essential relation to the subject matter of the preceding title is not made plain. The Porto Rican Code follows closely its Spanish model in these two titles, although there has been an attempt by the Porto Rican codifiers to remedy the defect above mentioned by the insertion in the seventh title⁶⁹ of the classification of servitudes which affect land, into personal and real servitudes. Under the first heading are included usufruct, usus, and habitatio, which constitute the subject matter of the preceding title. It would seem that the application of this classification to all partial real rights, inserted at the beginning of Title VI, would have been helpful in showing the mutual relations of these institutions.

The classification of the third book of the Spanish Code on Different Ways of Acquiring Ownership does not seem especially happy. There is no attempt at a logical and complete enumeration of the various methods by which ownership may be acquired. One very important mode of acquirement, namely, by accession, has been already considered in the previous book in connection with ownership. Doubtless the Spanish legalists were influenced in this by the Code Napoléon, which follows the same method of presentation. The translation of the Spanish *ocupacion*, of the first title, by "Retention," as given in the official version of the United States Government and also in the Porto Rican Code, is not so suggestive as the "Occupancy" of Dr. Walton's translation, which exactly reproduces the Spanish and Latin originals, and deals with the acquirement of a *res nullius* by the finder or captor, in the case of hidden treasure or wild animals.

The most important title of this book is the third one, on successions. This long title, Articles 657-1087 of the Spanish Code, is adopted by the Porto Rican revisers with only slight changes. The

⁶⁸ Cf. Sohm, op. cit., p. 359.

⁶⁹ Sec. 538, apparently borrowed from the Louisiana Code, Art. 646.

Military Wills and Maritime Wills are omitted from the Porto Rican Code and the section on wills made in foreign countries is considerably condensed, as are also the provisions in regard to rights of surviving spouse and of illegitimate children.

The provisions for an holographic will of the Spanish code are reproduced in the American code, and are considerably more elaborate than the simple provision of the Code Napoléon and Louisiana Code, that, "an olographic will shall not be valid unless it be written throughout, dated and signed by the hand of the testator."⁷⁰ In addition to the above provisions the Spanish-Porto Rican holographic will "shall be placed in a protocol, being presented for this purpose to the district court of the last domicile of the testator, or the court of the district in which said testator dies, within five years from the date of his death."⁷¹ The person with whom such a will is deposited shall present the same to the District Court within ten days after he hears of the death of the testator.⁷² The will when presented to the court shall be proved by means of three witnesses who are acquainted with the handwriting and signature of the testator or in absence of such witnesses by handwriting experts.⁷³ The Porto Rican code provides that a literal certified copy of the will and of the proceedings in proof of it, issued by the District Court, "shall constitute a sufficient title for the recording of the real property of the inheritance, in whole or in part, in the registry of property."⁷⁴

The old principle of the Falcidian fourth,⁷⁵ reserved by law for legitimate heirs, *heredes necessarii*, the *legitime* of the Code Napoléon and the Louisiana Code,⁷⁶ is preserved in the Spanish Code and in the Porto Rican revision. "The lawful portion of children and their legitimate issue * * * is two-thirds of the hereditary property of the father and of the mother, though one of the two-thirds may be disposed of by parents for the purpose of applying it as a betterment to their children and issue."⁷⁷ A betterment is defined by the Spanish Code,⁷⁸ as one of the two-thirds of the estate constituting the legal portion which may be disposed of by the parent in favor of one or more of their children or descendants.

The course of the Spanish legalists in breaking up the subject

⁷⁰ Code Napoléon, Art. 970; cf. La. Code, Art. 1588.

⁷¹ Porto Rican Code, Sec. 698; cf. Sp. Code, Art. 689.

⁷² P. R. Code, Sec. 699; cf. Sp. Code, Art. 690.

⁷³ P. R. Code Sec. 700; cf. Sp. Code, Art. 691.

⁷⁴ P. R. Code, Sec. 702.

⁷⁵ Gaius, Inst. 2, 227; cf. Just. Inst. 2, 22.

⁷⁶ Code Nap., Art. 913; cf. La. Code, Art. 1493-1495.

⁷⁷ P. R. Code, Sec. 796; cf. Sp. Code, Art. 808.

⁷⁸ Art. 823.

of the different modes of acquiring property into the subject matter of Book III, on Different Ways of Acquiring Ownership, and Book IV, on Obligations and Contracts, will certainly meet the approval of English jurists, followers of Austin, for "it is one of Mr. Austin's greatest services to the science of law that he brought the distinction between the *iura in rem* and *iura in personam* into use again and pointed out its important applications, after it had been for a century or more completely lost, as it were, to English thought and language."⁷⁹

It is to be regretted that the simple classification of *iura in personam* or obligations, on the principle of the source whence they arise, as given by Gaius and Justinian,⁸⁰ was not explicitly followed by the Spanish codifiers. Titles I-XV do, as a matter of fact, include the *iura in personam* arising *ex contractu* while quasi-contracts and delicts are all considered in the short title XVI (Art. 1887-1910) under the caption of Obligations Contracted Without Agreement. To an English or American lawyer, used to our voluminous treatises on torts, with their elaborate enumeration of varieties of tortious act, the single page of the Spanish Code (Art. 1902-1910) devoted to the subject of delicts and quasi delicts, may be somewhat of a surprise, but the all embracing provision of Article 1902, "A person who by act or omission causes damage to another, when blame or negligence intervenes, shall be bound to make an indemnity for the damage done," would seem to cover any possible case of tort. The Porto Rican Code is an exact copy of the parent code in this chapter.

The striking resemblance of the treatment of the subject of contract by the Spanish legalists to that so familiar to English and American students, as given in the standard treatise by Anson, is another exemplification of Bryce's dictum,⁸¹ that it is in the realm of contractual relations that law tends to uniformity in the modern world. This is none the less striking even though we may surmise that there is an historical connection between the two in the use of the same or a similar source by the Spanish and the English jurists. Contract in the modern world has become a body of logical legal doctrine universal in scope and application. The discussion of the

⁷⁹ Hammond, *Int. to Am. Ed. of Sandar's Justinian*, p. L.

⁸⁰ Inst. 3, 13, 2. *Aut enim ex contractu sunt aut quasi ex contractu, aut ex maleficio, aut quasi ex maleficio.* Cf. Gaius, Inst. 3, 88.

⁸¹ "The more any department of law lies within the domain of economic interest, the more do the rules that belong to it tend to become the same in all countries. * * * But the more the element of human emotions enters any department of law, the greater becomes the probability that existing divergences between the laws of different countries may in that department continue, or even that new divergences may appear." Bryce, *Studies in History and Jurisprudence*, p. 123.

Essential Requisites for the Validity of Contracts⁸² reproduces the familiar Formation of Contract of Anson.⁸³ Corresponding to the subject of Consent of the Spanish Code,⁸⁴ we have the English Offer and Acceptance, Capacity of Parties and Reality of Consent.⁸⁵ The Definite Object of the Spanish Code considers the Legality of Object of our English text-book.⁸⁶ Finally, the *causa* of the Spanish Code⁸⁷ is certainly the analogue of our "consideration." How complete is the analogy of the Roman *causa* to the English consideration, the Porto Rican revisers have left us somewhat in doubt. The Spanish *causa* is uniformly translated "consideration" by the United States official version of the Civil Code, also by Dr. Walton in his translation, and by the Porto Rican Commissioners. But Section 1241 of the Porto Rican Civil Code says "In contracts, involving a valuable consideration, the prestation or promise of a thing or services by the other party is understood as a consideration for each contracting party; in remuneratory contracts the services or benefits remunerated and in those of pure beneficence, the mere liberality of the benefactor."⁸⁸ This is evidently the *contrat de bienfaisance* of the French code,⁸⁹ in which the *causa* of the old Roman law and its modern derivatives is broader in its application than is the English consideration.⁹⁰

The question naturally arises how these so-called contracts of pure beneficence will be handled by the Porto Rican courts. Will the mere intention of conferring a gratuitous benefit be a sufficient foundation for a binding unilateral promise? The solution of this problem in our other Roman-American Codes has been found in the assimilation of the Roman *causa* in all particulars, to the analogous English consideration. The Civil Code of Quebec speaks of "A lawful cause or consideration"⁹¹ as one of the four requisites to the validity of a contract, without apparently making any distinction between cause and consideration. The Civil Code of Louisiana says in so many words, "Cause is consideration or motive."⁹² One would naturally expect that all such cases would

⁸² Sp. Code, Art. 1261—P. R. Code, Sec. 1228.

⁸³ Principles of Contract, Part II.

⁸⁴ Art. 1261-1270; cf. P. R. Code, Sec. 1228-1237.

⁸⁵ Anson, Part II., Chap. I., III., and IV.

⁸⁶ Sp. Code, Art. 1271-1273—P. R. Code, Sec. 1238-1240; cf. Anson, Part I., Chap. V.

⁸⁷ Art. 1274-1277—P. R. Code, 1241-1244; cf. Anson, Part I., Chap. II.

⁸⁸ Cf. El Código Civil Español, Art. 1274. *En los [contratos] de pura beneficencia [se entiende por causa] la mera liberalidad del bienhechor.*

⁸⁹ Code Napoleon, 1105. *Le contrat de bienfaisance est celui dans lequel l'une des parties procure à l'autre un avantage purement gratuit.*

⁹⁰ Cf. Pollock, Principles of Contract, p. 152 and Note.

⁹¹ Civil Code of the Province of Quebec. Annotated by Beauchamp, Art. 984.

⁹² Art. 1896.

be decided in accordance with Louisiana precedents, whatever may be the opinion of the court as to the intrinsic nature of consideration.⁹³

To the American lawyer one of the most interesting phases of contract in the derivative Roman system is the class of contracts relating to property by reason of marriage. The title on this subject in the Spanish Code is followed in its general outlines by the Porto Rican revisers, though they have omitted the distinctions between the appraised and the unappraised dower, the sections on administration and usufruct of dower, on restitution of dower, and on paraphernal property. According to Paso y Delgado⁹⁴ the institution of conjugal partnership goes back to the *Fuero Juzgo* and therefore may be assumed to be of Germanic origin. The great respect paid to woman by our Teutonic forefathers thus found legal expression, by assigning to the woman in the marriage relation a material share in the partnership property. The dower of the Spanish system is similar to the old Roman *dos*, in that it consists of the "property and rights brought as such by the wife to the marriage at the time of contracting it,"⁹⁵ though it includes also such property and rights as she may acquire during marriage by gift, inheritance or legacy, as dower property. There is a survival of the later Roman *donatio ante nuptias*,⁹⁶ in fact though not in name, in the provision that, "The husband may create it [the dower] before the marriage but not after it,"⁹⁷ while the *donatio propter nuptias* of Justinian⁹⁸ seems to be done away with by the provision⁹⁹ that, "all gifts between spouses bestowed during marriage shall be void." The use of the *dos*, however, as a contribution for the defrayal of the expenses of the marriage, *ad matrimonii onera ferenda*,¹⁰⁰ does not seem to be contemplated in the modern Spanish system. It is simply the separate property of the married woman. This is shown by the fact that the support of the marriage relation is not made a charge upon the dowry but upon the property of the conjugal partnership.¹⁰¹

It is this conjugal partnership, the "community of acquets and gains," that constitutes the distinctive feature of the derivative Roman codes,¹⁰² and the provisions of the Spanish Code on this sub-

⁹³ Cf. Civil Code of Louisiana, Art. 1773; 49 La. An. 1426, Succession of Rabasse.

⁹⁴ *Derecho Civil Español*, p. 478.

⁹⁵ Sp. Code, Art. 1336—P. R. Code, Sec. 1303.

⁹⁶ First mentioned in the constitution of Theodosius and Valentinian; See Cod. Just. 5, 17, 8, 4; cf. Sandar's Just. Inst., p. 222.

⁹⁷ Sp. Code, Art. 1338—P. R. Code, Sec. 1304.

⁹⁸ Inst. 2, 7, 3; Cod. 5, 3, 19, 20.

⁹⁹ Sp. Code, Art. 1334—P. R. Code, Sec. 1301.

¹⁰⁰ Cf. Sohm, *Institutes*, p. 484.

¹⁰¹ P. R. Code, Sec. 1323, 5—Sp. Code, Art. 1408, 5.

¹⁰² Cf. Am. Law Reg. 29, p. 19.

ject are similar to those of the Louisiana Civil Code, as might be expected from their similar source. The earnings or profits obtained by either of the spouses during the marriage belong to the husband and wife share and share alike,¹⁰³ and this conjugal partnership is governed by the rules of articles of ordinary partnership in all that does not conflict with the express provisions on the subject of conjugal partnership.¹⁰⁴ The property of the conjugal partnership consists of: (1) Property acquired at the expense of the partnership property. (2) That obtained by the industry, salaries or work of the spouses. (3) The income from the partnership or from that of either spouse, during the continuance of the marriage.¹⁰⁵ The charges on the conjugal property are: (1) Debts legally contracted by either spouse during marriage. (2) Arrears or interest accrued during marriage, of obligations which affect the private property of the spouses as well as the partnership property. (3) Minor repairs to property of either spouse. (4) Extensive or minor repairs to conjugal property. (5) Support of the family and education of children.¹⁰⁶ The husband is the administrator of the conjugal property, with some exceptions—in the Porto Rican Code—in regard to property in shares of a building or loan association, though he may not sell nor incumber real estate of the partnership without the consent of the wife. He may dispose of his half of the property by will. The partnership expires when the marriage is dissolved in the cases indicated by the Code, or is declared null. In the final article of this chapter we have detailed rules as to the method of liquidation of the property on the dissolution of the partnership.¹⁰⁷

The Spanish Code avoids the confusion of the terms "sale" and "contract of sale" by using the latter term, which is described as a contract by which "one of the contracting parties binds himself to deliver a specified thing and the other to pay a certain price therefor in money or in something representing the same."¹⁰⁸ This is the contract of sale of the classic Roman law, which is perfected as soon as the parties have agreed upon the price and upon the object of the contract.¹⁰⁹ As regards the *beneficium rei* in the contract of sale, the Spanish Code says that, "A creditor has the rights to the fruits of a thing from the time the obligation to deliver it arises. However, he shall not acquire a property right thereto until it has been delivered

¹⁰³ Cf. Sp. Code, Art. 1392—P. R. Code, Sec. 1310.

¹⁰⁴ Sp. Code, Art. 1395—P. R. Code, Sec. 1313.

¹⁰⁵ Sp. Code, Art. 1401—P. R. Code, Sec. 1316.

¹⁰⁶ Sp. Code, Art. 1408—P. R. Code, Sec. 1316.

¹⁰⁷ Sp. Code, Art. 1432-1443; cf. P. R. Code, Sec. 1331-1341.

¹⁰⁸ Sp. Code, Art. 1445—P. R. Code, Sec. 1348.

¹⁰⁹ Gaius, Inst. 3, 139; Just. Inst. 3, 23; cf. Sp. Code, Art. 1, 450—P. R. Code, Sec.

to him."¹¹⁰ There seems to be no such equally explicit statement in regard to the *periculum rei*. In Article 1182 of the Spanish Code¹¹¹ we have the statement that "an obligation consisting in the delivery of a specified thing, *shall be extinguished* when said thing should be lost or destroyed without fault of the debtor and before he shall be in default." If this is the reproduction of the classical Roman provision that the purchaser bears the accidental loss occurring before the delivery of a thing, it certainly lacks the definiteness of its Roman model, which distinctly says that in case of accidental loss of the thing, the purchaser is still bound to pay the price.¹¹²

The modern code retains in its main outlines the provisions of the classical law in regard to warranty. The vendor shall warrant to the vendee:

(1) The legal and peaceful possession of the thing sold.

(2) That there are no hidden faults or defects therein.¹¹³

The vendor may, however, stipulate for exemption from the obligation of answering for eviction, if there is no bad faith on his part,¹¹⁴ and also against hidden defects, if he should have been unaware of such faults.¹¹⁵

The Spanish codifiers, following the example of the French, have not attempted the classification of obligations arising from contract on any principle. They have, nevertheless, followed in general the method of treatment of this subject laid down by Gaius and modified by Justinian. The contracts of lease, of partnership, and of agency—coming in the order mentioned after the contract of sale—are the familiar *locatio conductio*, *societas* and *mandatum* of Gaius and of Justinian.¹¹⁶

Coordinate with the subject of lease in general, we have in the Porto Rican Code, copied from the Spanish original, the subject of annuities or *censos*, defined as,¹¹⁷ "not technically a rent charge, but an annuity charged directly on real estate, and also involving personal liability." As the most important annuity we have the emphy-

¹¹⁰ Sp. Code, Art. 1095—P. R. Code, 1062.

¹¹¹ P. R. Code, Sec. 1150.

¹¹² Just. Inst. 3, 23, 3. *Cum autem emptio et venditio contracta sit...periculum rei venditae statim ad emptorem pertinet...emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere.*

¹¹³ Sp. Code, Art. 1474—P. R. Code, Sec. 1377; cf. Sohm, Institutes, Sec. 82.

¹¹⁴ Sp. Code, Art. 1475, last par. and 1476—P. R. Code, Sec. 1378, last par. and 1379.

¹¹⁵ Sp. Code, Art. 1485—P. R. Code, Sec. 1388.

¹¹⁶ Sp. Code, Book IV., Titles VI.-IX., adopted by the Porto Rican revisers; cf. Gaius, Inst. 3, 142-162; Just. Inst. 3, 24-26.

¹¹⁷ Sp. Code, p. 208, note—P. R. Code, p. 1104, note.

¹¹⁸ Sp. Code, Book IV., Title VII., reproduced in the corresponding subdivisions of the Porto Rican Code.

teutic annuity.¹¹⁸ This is the old Roman grant of land in perpetuity or for a term of years, subject to a payment of rent, declared by the Emperor Zeno to be a contract *sui generis*, governed by its own rules.¹¹⁹ The *emphyteuta* stood in the same relation to the *dominus* as did the freeholder or copyholder to the lord in feudal times. It has retained in the modern codes its old time characteristics, even in such details as the forfeiture by the *emphyteuta* in case of non-payment of the annuity for three consecutive years.¹²⁰

The modern principle of agency, *qui facit per alium per seipsum facere videtur*, seems to be fully recognized in the modern codes, in the provision that, "a principal must fulfill all the obligations which the agent may have contracted within the scope of his authority."¹²¹ In this, the Spanish-Roman Codes show the same advance on the classical Roman law as is found in other modern derivatives of the old Roman system, which never advanced beyond the point of view that a contract concluded by a representative, imposes, on principle, a liability not on the person represented, but on the representative.¹²²

The term "bailment" does not appear in the index to the Spanish Code, and seems to have been put into the index of the Porto Rican Code merely as a concession to its use by English lawyers, with a cross reference to "loans" and "depositum." Nor do the contracts *re*, as such, of the old classical law¹²³ appear, which, including, as they do, *mutuum*, *commodatum*, *depositum* and *pignus*, correspond so closely to our conception of the institution "bailment," as being a contract whose essential characteristic is the delivery of a thing.

All obligations arising without agreement are treated of under one short title,¹²⁴ including, in the first chapter, the subject of quasi-contracts, and in the second, all obligations arising from fault or negligence, of both the delictual and quasi-delictual type. The definition of a quasi-contract as, "a licit and purely voluntary act by which the author becomes obligated with regard to a third person, and, sometimes, by which there results a reciprocal obligation between the parties concerned," may be characterized as quite as unsatisfactory by way of definition as are most of the definitions of the quasi-contract in our own text-books. The instances of quasi-contract cited are the familiar ones noted by Justinian; namely, those arising in case one takes upon himself the management of another's business, and the case of money paid by mistake.¹²⁵

¹¹⁸ Just. Inst. 3, 24, 3.

¹¹⁹ Sp. Code, Art. 1648, 1—P. R. Code, Sec. 1551, 1; cf. Cod. Just. 4, 66, 2.

¹²¹ Sp. Code, Art. 1727—P. R. Code, Sec. 1629.

¹²² Sohm, Inst., p. 448.

¹²³ Gaius, 3, 90; Just. Inst. 3, 14.

¹²⁴ Sp. Code, Book IV., Title XVI.—P. R. Code, same title.

¹²⁵ Just. Inst. 3, 27.

The brief treatment of what in English law constitutes the subject of torts has already been noticed.¹²⁶ The confusion of torts and crimes of the old Roman models,¹²⁷ so often noticed and criticised, has been, of course, avoided in the modern systems by the relegation of all crimes to a separate penal code.

The Spanish Code imitates the Code Napoléon in incorporating under the treatment of obligations the subjects of concurrence and preference of credits, and the subject of prescriptions. In these particulars it is imitated by the Porto Rican Code.

The Final Provision of the Spanish Code runs as follows:¹²⁸ "All the legal compilations uses and customs, which constitute the common civil law, *in all matters which are the object of this Code*, are hereby abrogated." The parenthetical, italicized clause of this provision has been severely criticised because of the ambiguity in the word *matters*.¹²⁹ The Porto Rican revisers have avoided ambiguity by the provision that, "The Civil Code and all other laws or bodies of law which directly or indirectly are in conflict with the provisions of this revised Civil Code are repealed and left without force or effect."

It is a striking commentary on the practical identity of the legal provisions in regard to vested rights of property in different modern systems of law, that the Transitory Provisions of the Spanish Code on this subject have been copied verbatim by the Porto Rican revisers, with the exception of the paragraphs, 5-7 and 9-11, which deal with the property rights of those under parental or tutorial control.

From the comparison, on the one hand, of the old Roman law with its modern descendant, and, on the other, of the modern Roman-Spanish Code with the Anglo-Saxon system, we may note that the tendency in the late continental Roman Code seems to be in the direction of a return to the classic model. The most important differences between the Spanish Civil Code and the Code Napoléon, in matters of classification, at least, are shown in the greater likeness of the Spanish Code to the institutional treatises of Gaius and Justinian. One of these changes; namely, the resuscitation of the distinction between *ius in rem* and *ius in personam*, has also previously received the endorsement of the best English legalists as a useful principle of classification.

The comparison of the Spanish Code with the Porto Rican shows,

¹²⁶ Cf. *supra*, p. 189.

¹²⁷ Gaius, Inst. 3, 182-225; Just. Inst. 4, 1-4.

¹²⁸ Sp. Code, Art. 1976.

¹²⁹ See Walton, *The Civil Law in Spain and Spanish America. Historical Introduction*, p. 110.

in the first place, a considerable diminution of bulk. This loss is mainly in the third and fourth books. In the third book this comes from the cutting out of the provisions for military and maritime wills, for the reason assigned by the codifier, Senor Lopez;¹³⁰ some simplification of the subject of wills made in foreign lands; and a material reduction in the provisions governing rights of surviving spouses,¹³¹ and of rights of illegitimate children and acknowledged natural children.¹³² The subtractions from the fourth book are of the provisions affecting dower and conjugal partnership.¹³³

The changes in the second book are unimportant, consisting, as they do, of a number of definitions added from the Louisiana Code and the subtraction of a few titles on special properties.

The main change is in the first book, but it is significant that the change here is of the same general nature as in the other books. The subtractions are, in the main, from the provisions in regard to marriage, legitimacy of children, and the law of guardian and ward; together with the omission of all distinctions between Spaniards and non-Spaniards. The main additions are in the long corporation act, taken from State laws on the subject, and in the more elaborate provisions as to the effect of absence, taken from the Louisiana Code. The principle guiding the Porto Rican Commission, whether followed consciously or unconsciously, is evidently the one suggested by Bryce, before referred to.¹³⁴ We find the variations between the Spanish and the American Codes in those branches of law most affected by the play of emotion; namely, in the law of husband and wife, and parent and child. The cutting out of the provisions in regard to protutor and the family council, though indirectly to be referred to the same general principle, is more immediately dependent upon the fact that the functions of these institutions are more efficiently performed in the English system by our probate and equity courts. The more elaborate provisions in regard to illegitimate children and their rights have been wisely simplified in the American Code, since the social relations whence they sprung have no longer any influence on this side the water.

The main addition to the Porto Rican Code, on the juristic person, reflects faithfully the spirit of the present day which is giving to the corporate personality perhaps more attention than to any other legal institution. We may be assured, too, that this is the least stable part

¹³⁰ Report of Code Commission of Porto Rico, 1902, p. 13.

¹³¹ P. R. Code, Art. 821-823; cf. Sp. Code, 834-839.

¹³² Sp. Code, Art. 840-843 and 939-945; cf. P. R. Code, Secs. 824 and 913.

¹³³ Sp. Code, Art. 1337-1440, *passim*.

¹³⁴ Cf. *supra*, N. 81.

of the new code, for it is in the realm where legal and political ideas are most unsettled.

It would seem to an outside observer that many of the definitions of the second book, borrowed from the Louisiana Code, might well have been dispensed with, and the same holds true of the more elaborate provisions in regard to "absence," of the first book, taken from the same source; though doubtless the practical experience of the Spanish member of the Code Commission, Senor Lopez, has shown the necessity of introducing them. The work of the Porto Rican Commission has certainly been well done, and assures the development of Porto Rican law along a line parallel to that taken by our other body of Spanish-Roman law, the Civil Code of Louisiana.

One of the practical suggestions of the study of this codification to a student and teacher of law, is the possibility that some modern Blackstone, as gifted as his great predecessor, may some day give us a new institutional treatise on law. The question of codification or no codification has resolved itself of late years—after our not too flattering practical successes with codes—into a pedagogical question rather than one of practical application of law in the courts. Such a treatise must present in succinct form the essential principles of modern law, and it would seem that no more efficient working model for such a book on the institutes of law can be found than one of our modern American codes based on the old Roman law. The improvements on the Code Napoléon made by the Spanish legalists, in *El Código Civil Español*, are mainly in the line of a return to Gaius, and the successful adaption of this code to a modern American territory shows that the fundamental principles of world law may now be stated lucidly and in moderate compass.

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